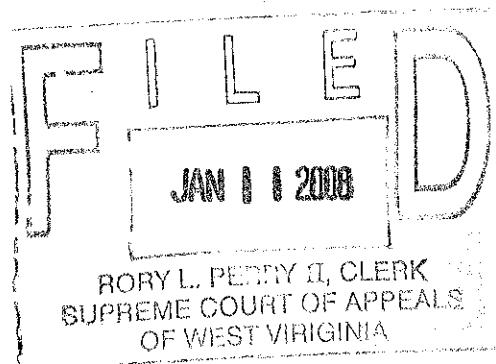


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**No. 33716**

**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA  
at Charleston**

**In Re: Abbigail Faye B.**



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**FROM THE CIRCUIT COURT OF  
CABELL COUNTY, WEST VIRGINIA  
Civil Action No.: 07-CIGR-1  
(Judge John L. Cummings)**

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**BRIEF OF THE GUARDIAN AD LITEM**

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## TABLE OF CONTENTS

	<u>Page</u>
<u>PROCEEDINGS BELOW</u>	1
<u>STATEMENT OF FACTS</u>	2
<u>SUMMARY OF ARGUMENT</u>	4
<u>ARGUMENT</u>	4
<u>CONCLUSION</u>	6

## **TABLE OF AUTHORITIES**

	<b><u>Page</u></b>
<b><u>Cases</u></b>	
<u>Carr v. Hancock</u> , 216 W.Va. 474, 607 S.E.2d 803 (2004)	4
<u>In re Willis</u> , 157 W.Va. 225, 207 S.E.2d 129 (1973)	6
<b><u>Statutes</u></b>	
W.Va. Code § 44-10-3	2,5
W.Va. Code § 49-3-1	5
W.Va. Code § 49-6-2	5
<b><u>Other</u></b>	
W.Va. Rules of Practice and Procedure for Family Court-Rule 48a	5,6
W.Va. Rules of Procedure for Child Abuse and Neglect Proceedings-Rule 3a	6

No. 33716

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

In re: Abbigail Faye B.

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BRIEF OF THE GUARDIAN AD LITEM

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PROCEEDINGS BELOW

This case involves an appeal from an infant guardianship proceeding that was heard by Judge John L. Cummings in which he denied the petition and placed the child with her biological parents. The proceedings started with the filing of cross domestic violence complaints and an infant guardianship petition before Family Court Judge Ronald Anderson. Judge Anderson referred the case to Circuit Court due to the allegations of abuse and neglect in the pleadings. The Department of Health and Human Resources, Child Protective Services Office, after conducting its investigation did not substantiate abuse or neglect and did not file a petition. Judge Cummings conducted a full hearing of the evidence and found that abuse and neglect by the biological parents had not been proven.

### **STATEMENT OF FACTS**

On February 20, 2007, the Respondent, Autumn S., filed a Domestic Violence Petition, on behalf of Abbigail Faye B., in the Magistrate Court of Cabell County, against the Petitioner, Gala P., alleging that Gala had threatened to strike her and would not return Abbigail Faye B. to her. The case was referred to Family Court as 07-DV-121. On the same day, Gala P. filed a pro se Petition for Appointment of Guardian, pursuant to W.Va. Code § 44-10-3, in the Family Court of Cabell County (07-FIG-16) in which she alleged that, "mother has run away and left the baby Abbigail with the maternal grandparents. The whereabouts of mother are unknown." This petition was amended on March 1, 2007 to include allegations of abuse and neglect by Autumn S. and Josh B. On February 21, 2007, the Petitioner, Gala P. filed a Domestic Violence Petition, on behalf of Abbigail Faye B., with the Magistrate Court of Cabell County. The case was referred to Family Court as Case number 07-F-124.

All three cases were referred to Family Court Judge Ronald Anderson, who convened a hearing on this matter on February 27, 2007. Judge Anderson signed an order allowing the release of medical records to the guardian ad litem and continued the case for a full hearing on March 2, 2007.

After a hearing on March 2, Judge Anderson issued a Temporary Order which made Josh B. a party to the case, since he had signed a paternity affidavit, and made referrals to the circuit court and to the Child Protective Services Office of the Department of Health and Human Resources (hereinafter referred to as CPS). Judge Anderson placed Abbigail Faye B. in the temporary custody of the Petitioners, Gala P. and Brent P., with supervised visitation by her parents, until further order of the Circuit Court. The parties were ordered not to threaten,

harass or intimidate one another subject to sanctions by the Court. The Domestic Violence Petitions were found to contain allegations that were addressed by the Temporary Order and were dismissed.

The Disposition of the CPS investigation was filed on April 26, 2007. It found that abandonment was not substantiated but there was moderate risk. The child was living with maternal grandparents and community services had begun. Based on these findings, the Department would not be filing an abuse and neglect petition.

This case had been referred to Judge Cummings, as case number 07-CIGR-1, and he presided over hearings on May 7, May 25, and June 8, 2007. The court issued an order on July 9, 2007, denying the Petition for Guardianship. Petitioners filed a motion to stay the order pending appeal to this court on July 13. A hearing on the motion was held on July 23 and the court denied the motion to stay by an order entered on August 13.

## **SUMMARY OF ARGUMENT**

The Circuit Court correctly applied Rule 48a of the Rules of Practice and Procedure for Family Court in this case.

## **ARGUMENT**

### **THE CIRCUIT COURT CORRECTLY APPLIED RULE 48a OF THE RULES OF PRACTICE AND PROCEDURE FOR FAMILY COURT IN THIS CASE.**

The guardian ad litem would submit that the proper standard of review in a case which challenges the correctness of a circuit court's order concerning custody of a child can be found in Carr v. Hancock, 216 W.Va. 474, 607 S.E.2d 803 (2004), which provides that:

[i]n reviewing a final order entered by a circuit court judge upon a review of, or upon a refusal to review, a final order of a family court judge, we review the findings of fact made by the family court judge under a clearly erroneous standard, and the application of law to the facts under an abuse of discretion standard. We review questions of law *de novo*.

id., at 805-6.

On April 3, 2006, this court adopted a set of Emergency Amendments upon the recommendation of the Overlap of Child Abuse and Neglect Issues in Family and Circuit Court Committee and the Court Improvement Program Oversight Board and after a public comment period. These rules, now commonly known as the Overlap rules were aimed at focusing the attention of the judiciary on child abuse and neglect allegations that were being raised in Family Court but were not receiving adequate investigation by CPS. This case contained allegations of

abuse neglect when it was heard by Family Court Judge Ronald Anderson. At the time of the hearing, Judge Anderson was told by CPS that they had already received a referral on the facts and were investigating this case. Judge Anderson's Temporary Order explicitly makes a referral to the Circuit Court due to allegations of abuse and neglect.

The provisions of Rule 48a (a) of the Rules for Practice and Procedure for Family Courts provides, in relevant part:

If a family court learns that the basis, in whole or in part, of a petition for infant guardianship brought pursuant to W.Va. Code § 44-10-3, is an allegation of child abuse and neglect as defined in W.Va. Code § 49-1-3, then the family court before whom the guardianship proceeding is pending shall remove the case to the circuit court for hearing. . . . At the circuit court hearing, allegations of child abuse and neglect must be proven by clear and convincing evidence.

The allegations in the petition and the amended petition for Guardianship for this case all fit under potential abuse and neglect as defined in W.Va. Code §49-3-1. The evidence presented by the petitioners can be described this way: Autumn is incapable of caring for Abbigail while Josh is abusive and irresponsible.

The findings of the CPS investigation (Record at page 13) conclude that there was insufficient grounds to file an abuse and neglect petition in this case. The Petitioners argue that this court should abandon the clear and convincing standard of proof for abuse and neglect allegations provided for in Rule 48a, which mirrors the standard set for abuse and neglect cases is W.Va. Code § 49-6-2(a), and adopt a standard that can be found in an article of the code that has historically dealt with the administration of estates and trusts.

If this court adopts the position proposed by the petitioners, it will be establishing an



alternative proceeding that can be used to remove children from the custody of their biological parents using the best interests of the child standard alone. This is not the standard that was established by this court in its adoption of the overlap rules in 2006 and the guardian ad litem would respectfully submit that clear and convincing evidence should continue to be the test used in deciding abuse and neglect allegations. "In the law concerning custody of minor children, no rule is more firmly established than that the right of a natural parent to the custody of his or her infant child is paramount to that of any other person; it is a fundamental personal liberty protected and guaranteed by the Due Process Clauses of the West Virginia and United States Constitutions." In re Willis, 157 W.Va. 225, 207 S.E.2d 129, 136 (1973).

The petitioners criticize the circuit court for not using mandamus proceedings, pursuant to section of Rule 3a of the Rules for Child Abuse and Neglect Proceedings, to compel CPS to file an abuse and neglect petition. Brenda Wright testified that a case would be opened with services if Abbigail Faye B. were returned to her parents. (Tr. for 5/25/07, at page 93). CPS did monitor the services and the situation in the home after the court ordered transfer took place as was reflected at the hearing on July 23. With neither the circuit court decision nor the findings of CPS having adopted the petitioner's interpretation of the level of risk to this child, Rule 3a is not applicable to this case.

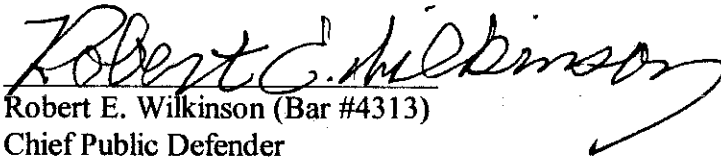
Judge Cummings' findings in this case are not clearly erroneous given the testimony and record before him. Rule 48a and its clear and convincing evidentiary standard for abuse and neglect allegations represent the legally mandated standard of law to apply in this case so there was no abuse of discretion. Finally, the legal standards and procedures used here provide a good balance for the rights of the natural parents and the best interests of the child. The guardian ad

litem would submit that it is a more appropriate standard than the one presented by the Petitioners and should be upheld as a matter of law.

**CONCLUSION**

WHEREFORE, based on the foregoing, the guardian ad litem would submit that the judgment of the Circuit Court should be affirmed.

Respectfully submitted,



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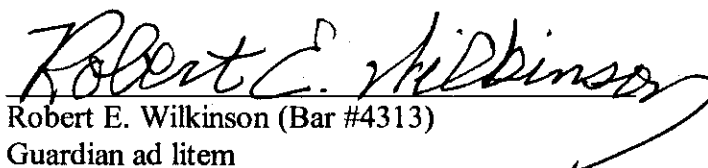
Guardian ad litem for  
Abbigail Faye B.

**CERTIFICATE OF SERVICE**

The undersigned counsel hereby certifies that a copy of the foregoing Brief of the Guardian ad litem was mailed to the following counsel by depositing a true copy thereof in the United States Mail, first class postage prepaid, on this 11<sup>th</sup> day of January, 2008, and addressed as follows:

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